85-603

NO.

Supreme Court, U.S.
FILED
OCT 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

ESTATE OF ALICE B. SMITH

Petitioner,

V.

UNITED STATES OF AMERICA

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

JOHN McENERY ROBERTSON
636 First NBC Building
210 Baronne Street
New Orleans, LA 70112
Telephone: (504) 525-9823
Counsel for Petitioners

Counsel of Record

55

QUESTION PRESENTED FOR REVIEW

Should the taxpayer be assessed penalties for late filing and payment of Federal Estate Taxes when the taxpayer was given erroneous advice by an IRS official or employee, on which the taxpayer relied and acted? U.S. v. Boyle, executor of the estate of Boyle, ____ U.S. ____, 105 S. Ct. 687-690, 83 L. Ed. 2d. 622 (1985). Internal Revenue Service Manual (CCH) § 4350, (24) ¶ 22.2 (2) (Mar. 20, 1980) (audit technique manual for estate tax examiners).

TABLE OF CONTENTS

	page
Brief	
Question Presented for Review	i
Opinions Below	1
Jurisdiction	2
Regulation Involved	2
Statement of the Case	3
Argument	10
Conclusion	13
Appendix A	14
Appendix B	23
Appendix C	25

TABLE OF AUTHORITIES

page

Cases Cited

U.S. v. Boyle, executor of the estate of Boyle, _____ U.S. _____, 105 S. Ct. 687-690, 83 L. Ed. 2d. 622 (1985). 12

Regulations Cited

Internal Revenue Service Manual (CCH) § 4350, (24) ¶ 22.2 (2) (Mar. 20, 1980) (audit technique manual for estate tax examiners). 2,11,12

26 CFR § 301.6651-1 (c) (1) (1985) 3

Statutory Provisions

28 U S C 210 (c) 2

Supreme Court Rule 20.2 2

Supreme Court Rule 20.4 2

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals in this matter is unrecorded, but was rendered after an oral argument. In its opinion and ensuing judgment, the Court of Appeals upheld the judgment of the United States District Court for the Eastern District of Louisiana, which dismissed the estate of Alice B. Smith's complaint against the United States of America. The opinion of the Fifth Circuit Court of Appeals is attached to this petition as Appendix A. The opinion of the United States District Court for the Eastern District of Louisiana is attached as Appendix B. The order of the Fifth Circuit Court of Appeals, denying rehearing, is attached as Appendix C.

JURISDICTION

The opinion of the Fifth Circuit Court of Appeals was dated and filed on June 17, 1985. A timely petition for rehearing was filed by the estate of Alice B. Smith. The Fifth Circuit Court of Appeals denied rehearing on July 16, 1985. This petition is timely filed within 90 days of that date pursuant to 28 U S C §2101 (c), and by Supreme Court Rules 20.2 and 20.4.

REGULATION INVOLVED

The only regulation involved in this case is Internal Revenue Manual (CCH) § 4350, (24) ¶ 22.2 (2) (Mar. 20, 1980) (audit technique manual for estate tax examiners):

> "(1) The delinquency penalty has repeatedly been said to be mandatory unless the required return was filed on time. This is subject, however, to a showing of 'reasonable cause' for the de-

> lay. The taxpayer has the burden of proving reasonable cause.
>
> "(2) What is 'reasonable cause'? The Tax Court has interpreted it to mean the exercise of ordinary business care and prudence. The Regulations (section 301.6651-1 (a) (3) adopt the same definition. The following eight specific causes for failure to file a return within the time prescribed by law, if clearly established by the taxpayer, will be accepted as reasonable.
>
> * * *
>
> "(c) Where the delay or failure to file was due to erroneous information given the taxpayer by an Internal Revenue officer or employee."

STATEMENT OF THE CASE

Petitioner, Thomas Barr III, was appointed Executor of the will of his aunt, Alice B. Smith, who died on May 22, 1974.

Petitioner, who is a practicing attorney of many years, and with much experience in probate matters, but none whatever in Federal Estate Tax matters, knew

that the Federal Estate Tax Return should be filed within nine (9) months of decedent's death, or as the time might be extended.

The decedent owned various undivided fractional interests in real estate and minerals located in the Parishes of Calcasieu, Cameron, Beauregard, Grant, Sabine and Jefferson Davis, Louisiana. These undivided fractional interests varied from minute fractional interest to as much as a four-sevenths (4/7) undivided interest in real estate, all of which is situated more than 200 miles from Orleans Parish, the venue of the succession proceeding and domicile of Thomas Barr III.

Petitioner engaged appraisers to appraise both the real estate and the mineral interests. The appraisal of the mineral interests was received in time to file the return by the extended date of

August 22, 1975; however, the appraisal of the real estate was not received until long after the deadline of August 22, 1975 for filing the return had expired.

Thomas Barr III secured the services of Reinauer Real Estate Corporation through its President, Mr. Moses Abelman, on August 5, 1974 (within three months following the date of Mrs. Smith's death).

On August 8, 1974, Thomas Barr III forwarded to Mr. Abelman the necessary information for him to make the appraisal of the real estate in question.

In an attempt to obtain the appraisals timely, Thomas Barr III unsuccessfully corresponded with Mr. Abelman, to determine when the appraisal would be completed, on September 11, 1974, December 2, 1974, January 15, 1975, February 20, 1975, April 3, 1975, April 21, 1975,

May 23, 1975, June 30, 1975, July 9, 1975, July 30, 1975, August 20, 1975, September 4, 1975, September 15, 1975, September 17, 1975, September 19, 1975, October 2, 1975, and November 20, 1975.

Petitioner also engaged an accountant to prepare and actually file the return because he had no experience whatever in the preparation or filing of Federal Estate Tax Returns.

An application for extension of time to May 22, 1975 was granted.

On May 2, 1975 petitioner submitted Form 4768 heading Application for Extension of Time to File U.S. Estate Tax Return and/or Pay Estate Tax. Part II, the reasons given were:

> "Appraisals of mineral rights have been completed, however land appraisals are not complete to date and indications are that they will not be complete by May 22, 1975 (extended due date for filing the Estate Tax Return)"

Part III, Extension of Time to Pay gave as reasons:

> "Appraisals will not be completed in time to figure Estate Tax by the extended due date 5/22/75."

The form also included the following question:

> "PLEASE ADVISE IF WE SHOULD MAIL A PAYMENT TO AVOID ANY PENALTY". (capitals added)

The extension to file and pay was approved to August 22, 1975 with the following advice:

> "Please attach a copy of this form to the return when filed."

On July 15, 1975, petitioner, on his accountant's advice, filed another form 4768 and gave in Part II, Extension of Time to File as the reasons:

> "Appraisals of Mineral Rights have been completed. However, Land Appraisals are not complete to date

> and indications are that they will not be complete by August 22, 1975 (the extended due date for filing the Estate Tax Return)"

In Part III, Extension of Time to Pay,

the reason given was:

> "Appraisals will not be completed in time to figure Estate Tax by the extended due dated 8/22/75."

An extension to November 22, 1975 was requested and also the question was asked:

> "PLEASE ADVISE IF WE SHOULD MAIL A PAYMENT TO AVOID ANY PENALTY."

The application for extension to file was not approved because:

> "An extension of time to file the return cannot exceed six months from the original due date of the return unless an executor is abroad. YOU SHOULD ATTACH A STATEMENT TO THE RETURN WHEN FILED STATING WHY THE RETURN COULD NOT BE FILED TIMELY." (capitals added)

The return was filed late and the IRS assessed penalties for the late filing and late payment.

The penalties, interest and tax were paid. Claim for refund of the penalties was filed with the IRS, which was subsequently granted.

The IRS then contested the amount of discount for undivided ownership of appraisals and assessed an additional tax and reassessed the penalties for late filing and late payment, which were paid, in addition to the additional tax.

Suit was filed in the District Court contesting the additional appraisals by the IRS and for refund of the penalties. During the trial in the District Court, petitioner testified that the estate was amply solvent and a payment could have been made at any time.

The District Court decided that the delay in securing the appraisals of land was not a reasonable cause for the waiving of the penalties.

Timely appeal was had to the Fifth Circuit Court of Appeal, which also decided that the factual reasons given by petitioner were not reasonable cause for the waiving of the penalties.

ARGUMENT

The executor in the instant case had reasonable cause for the delays in filing the federal estate tax return in that he relied upon the erroneous advise of an Internal Revenue Service officer or employee. The Internal Revenue Service, by its own regulations, sets forth eight reasons for the late filing which it considers to constitute reasonable cause. One of those reasons is "the taxpayers reliance upon erroneous advise of an IRS

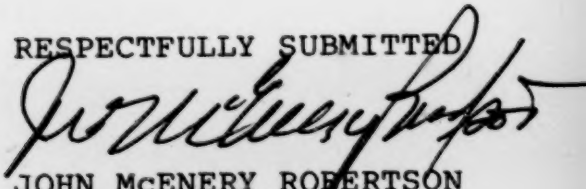
officer or employee". Internal Revenue Manual (CCH) § 4350, (24) ¶ 22. 2 (2) (Mar. 20, 1980) (audit technique manual for estate tax examiners). The United States Court of Appeals for the Fifth Circuit in the instant case did not take into consideration the undisputed fact that the taxpayer on two separate instances asked the Internal Revenue Service if a payment should be made to avoid any penalty. The Estate was amply solvent and could have made a partial payment which would have obviated a penalty. The response of the Internal Revenue Service was to attach a copy of the form the request was made upon when the return was filed. Indicating to the taxpayer that making said attachment to the return would excuse any penalty. Neither the United States District Court or the Fifth Circuit Court of Appeals applied the

"bright line" rule setforth in the United States vs. Boyle, Executor of the Estate of Boyle, _____ U.S. _____, 105 S. Ct. 687-690, 83 L. Ed. 2d 622 (1985), indicating that the reliance of the taxpayer on erroneous advise of the Internal Revenue Service is reasonable cause, and the taxpayer should not be penalized accordingly. Boyle, supra, n.8, further holds that reasonable cause is not only a question of fact, but the elements necessary to constitute reasonable cause are also a question of law. There can be no counter argument that the taxpayer was within the limits of the rules for legal reasonable cause as setforth by the Internal Revenue Service Manual, and the upholding of the assessment of penalty is clearly erroneous and is inconsistent with the letter and spirit of the law, regulations and this Honorable Court's decision in Boyle.

CONCLUSION

For the reasons setforth in this petition, the writ should be granted.

RESPECTFULLY SUBMITTED



JOHN McENERY ROBERTSON
COUNSEL FOR PETITIONER

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 84-3594

ESTATE OF ALICE B. SMITH,

Plaintiff-Appellant,

VERSUS

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District court for the Eastern District of Louisiana

---

(June 17, 1985)

Before RUBIN, WILLIAMS and DAVIS, Circuit Judges.

PER CURIAM:*

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

The Estate of Alice B. Smith (the Estate) appeals the dismissal of its action against the United States for a refund of excess payments for estate taxes, interest and late penalties. We affirm.

The appellant's contention that the estate taxes assessed by the government were excessive revolves almost entirely around the principal issue tried in the district court - the value of the surface and mineral interests owned by decedent at the time of her death. Experts testified in favor of the taxpayer's version and contrary experts supported the government's view. The record amply supports the property values advanced by the government and the district court's decision to credit the experts called by the government is not clearly erroneous.

Appellant also complains of the late interest and penalties assessed by the government which the district court in large measure approved. To escape the penalty for late filing and payment, the taxpayer "bears the heavy burden of proving both (1) that the failure did not result from 'willful neglect,' and (2) that the failure was 'due to reasonable cause.'" United States v. Boyle, ___ U.S. ___, 105 S.Ct. 687, 690, 83 L.Ed.2d 622, 627-28 (1985)(quoting 76 U.S.C. § 6651(a (1). "Reasonable cause" is defined in the regulation as events that the taxpayer could not avoid by the exercise of "ordinary business care and prudence." 26 C.F.R. § 301.6651-1(c)(1) (1984).

The record fully supports the district court's rejection of the various excuses for late filing and payment ad-

vanced by the executor of the estate, Thomas E. Barr, III. Most of the evidence on this issue was uncontested. Ms. Smith died on May 22, 1974, and shortly thereafter Mr. Barr, a lawyer, was appointed executor of her estate. Mr. Barr knew the estate tax return was due nine months after Ms. Smith's death and he promptly began preparation to file the return. In August 1974, Mr. Barr hired Moses Abelman, a real estate appraiser, and Stan Warburton, a geologist, to appraise the surface rights and mineral interests of the estate's property.

The estate tax return and tax were due on February 22, 1975. Because Barr was unable to obtain Abelman's appraisal before that time, he applied for and obtained an extension from IRS, until May 22, 1975, both to file the return and pay the tax. The IRS approved a second ap-

plication for extension through August 22, 1975, and a third extension through November 22, 1975. Barr received Abelman's final appraisal on June 23, 1976. The return was not filed nor the tax paid however until nine months later or on March 24, 1977.

Barr seeks to justify the late filing and payment on three principal grounds: 1) the dilatory presentation of Abelman's appraisal; 2) Barr's reliance on erroneous advice of his CPA; 3) erroneous advice from the IRS.

We agree with the district court that Barr's difficulty over a period of almost two years in getting a written appraisal from Mr. Abelman is not a reasonable excuse for the delay. Abelman's services as appraiser were within Barr's control. "Ordinary business care and prudence" dictated that Barr require pre-

sentation of the appraisal within an established deadline or find another appraiser. Also, it was not necessary for Barr to have the appraisal on hand in order to file the return. Under the regulations, Barr could have filed the return by the due date and later supplemented the return to include the information developed in Abelman's appraisal. See 26 C.F.R. § 20.6081-1(c)(1984). As the district court found, a reasonable inquiry would have led the executor, an attorney, to discover that such a supplemental filing was permitted by the regulations.

It is questionable whether Abelman's delay in furnishing the appraisal was a significant factor in Mr. Barr's tardy filing of the return. The return was not filed until March 24, 1977, nine months after the taxpayer received Abelman's written appraisal. The only excuse of-

fered by the taxpayer for the nine-month delay following receipt of the appraisal was that Barr was engaged in other business. This is obviously not reasonable cause for failing to timely file or pay. See Dustin v. Commissioner, 467 F.2d 47, 50 (9th Cir. 1972).

The estate also contends that Barr mistakenly believed that a sworn descriptive list of assets had to be filed in the state probate court before filing the estate tax return. The record does not reflect the basis for Barr's alleged mistaken belief and it does not present a reasonable excuse for the delay.

The estate also seeks to justify the delayed filing on grounds that it relied on erroneous advice from Mr. Phillips, the CPA engaged by Mr. Barr. Barr was at least as knowledgeable as Phillips with respect to the requirements for filing

the return. The district court correctly concluded that Barr could not, in the face of the clear regulations, abdicate his responsibility as executor by contending that he received erroneous advice from his CPA.

The estate next seeks to excuse its delay by contending that it relied on erroneous advice from IRS representatives. The IRS denied a July 15, 1975 request for an extension and suggested that an explanation as to why the return was filed late be attached to the return. Barr contends that this statement led him to conclude that no additions to tax would be asserted if Barr believed that the reasons for the delay were reasonable. Such an inference was manifestly unjustified.

We have considered the taxpayer's remaining arguments in support of its po-

sition that the delayed filing and payment were justified and find all of them without merit.

AFFIRMED.

APPENDIX "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ESTATE OF ALICE B. SMITH	CIVIL ACTION
VERSUS	NO. 81-3272
UNITED STATES OF AMERICA	SECTION: I

J U D G M E N T

This matter was tried before the Court, sitting without a jury, on a previous day. Now therefore, considering the Findings of Fact and Conclusions of Law entered by the Court herein,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendant, United States of America, and against the plaintiff, Estate of Alice B. smith, dismissing said plaintiff's com-

plaint with prejudice and costs.

New Orleans, Louisiana, this 16th day of August, 1985.

s/ Henry A. Mentz
UNITED STATES DISTRICT JUDGE

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 84-3594

ESTATE OF ALICE B. SMITH,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING

(July 16, 1985)

Before RUBIN, WILLIAMS and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and

numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

s/ W. Eugene Davis
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
DEC 12 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-603

In the Supreme Court of the United States

OCTOBER TERM, 1985

ESTATE OF ALICE B. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

MM

TABLE OF AUTHORITIES

Page

Case:

United States v. *Boyle*, No. 83-1266 (Jan. 9, 1985) 3, 4

Statute and regulation:

Internal Revenue Code of 1954 (26 U.S.C.):

§ 6075(a) 1

§ 6651(a) 1

§ 6651(a)(1) 2, 3

Treas. Reg. § 301.6651-1(c)(1) 3

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-603

ESTATE OF ALICE B. SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges the court of appeals' holding that it lacked "reasonable cause" for late filing of its estate tax return and late payment of its estate tax, and that it was in consequence liable for statutory penalties.

1. Alice B. Smith died testate on May 22, 1974. Her nephew, Thomas E. Barr, was appointed executor of the estate. Mr. Barr is an attorney with experience in handling probate matters. He retained Joseph Phillips, a certified public accountant, to prepare the federal estate tax return. He also retained two appraisers to provide opinions as to the value of the decedent's real estate and mineral interests (Pet. App. 17).

An estate tax return is required to be filed, and the estate tax paid, nine months after the decedent's death (26 U.S.C. 6075(a)). Petitioner's return was accordingly due on

February 22, 1975. Petitioner requested, and the IRS granted, two extensions of time to file the return and pay the tax, the second extension running to August 22, 1975 (Pet. App. 17-18). On July 15, 1975, petitioner requested a third extension of time, to November 22, 1975, stating that the additional time was necessary to complete appraisal of the real property interests. On the application, the executor typed the following: "[p]lease advise if we should mail a payment to avoid any penalty" (1 R. 80).

The Commissioner approved the requested extension of time to pay the tax, but not the requested extension to file the return. The application was accordingly returned to the executor with the following explanation: "[A]n extension of time to file the return cannot exceed six months from the original due date of the return unless an executor is abroad. You should attach a statement to the return when filed stating why the return could not be filed timely" (1 R. 80). The executor received from his appraisers on December 9, 1975, an opinion as to the value of the decedent's real estate interests. The estate tax return was filed, and the tax was paid, on March 24, 1977, more than one year and three months later (Pet. App. 18).

In a statutory notice of deficiency, the Commissioner asserted additions to tax (generally called "penalties") in the amount of $69,555 under 26 U.S.C. 6651(a) for late filing of the return and late payment of the tax (1 R. 2). The estate paid these amounts and filed an administrative claim for refund (1 R. 13). Upon its denial, the estate filed this refund suit in district court seeking inter alia a refund of the late-filing and late-payment penalties. The executor contended that his delay in filing and payment was "due to reasonable cause and not due to willful neglect" (26 U.S.C. 6651(a)(1)). The estate argued that the executor had relied on the advice of his accountant that no penalty would be assessed against the estate, that the delay in filing was due

to circumstances (*e.g.*, delay by the appraisers) beyond the executor's control, and that the executor had relied on so-called advice from the IRS that no penalty would be imposed. The district court granted judgment for the government on all issues (Pet. App. 23-24).

The court of appeals affirmed in a per curiam opinion (Pet. App. 14-22). It noted that, under this Court's decision in *United States* v. *Boyle*, No. 83-1266 (Jan. 9, 1985), a taxpayer seeking to avoid the late-filing penalty "bears the heavy burden of proving both (1) that the failure did not result from 'willful neglect,' and (2) that the failure was 'due to reasonable cause' " (slip op. 4, quoting 26 U.S.C. 6651(a)(1)). The court of appeals noted that the evidence was largely uncontested and held that "[t]he record fully supports the district court's rejection of the various excuses for late filing and payment advanced by the executor" (Pet. App. 16-17).

2. The court of appeals' decision is correct. Under the controlling regulation, a taxpayer who fails to file a return or pay taxes on time can avoid the consequential penalties only if he affirmatively shows that he exercised "ordinary business care and prudence" in attempting to meet the deadlines. Treas. Reg. § 301.6651-1(c)(1). Here, the return was filed and the taxes were paid over a year and three months late, following multiple extensions of time granted by the Commissioner. The estate blamed the delay on a variety of causes—negligence by appraisers, press of other business—but all of those excuses have been carefully considered and weighed by two courts, both of which have concluded, based on ample support in the record, that the estate failed to prove that the lateness was due to "reasonable cause." The overriding fact, which is undisputed, is that the executor, an attorney, was at all times aware of the deadlines and fully capable of meeting them. These circumstances preclude, as a matter of law, the existence of

"reasonable cause" for his failure to file on time and pay the tax when due. *United States* v. *Boyle, supra.*

Petitioner's sole contention at this point (Pet. i, 10-11) seems to be that the executor was entitled to infer, from the IRS's failure explicitly to "advise [him] if [he] should mail a payment to avoid any penalty" (1 R. 80), that he was not required to pay the tax on time. Petitioner contends that the Commissioner's actual response—a direction to " 'attach a statement to the return when filed stating why the return could not be filed timely' "—suggested to him that "making said attachment to the return would excuse any penalty" (Pet. 8, 11). In effect, petitioner argues that he inferred from the Commissioner's response that *any* reason he might see fit to give would satisfy the Internal Revenue Service. In view of the actual state of the law, and the fact that the executor was an experienced probate attorney, the court of appeals was plainly correct in holding that "[s]uch an inference was manifestly unjustified" (Pet. App. 21). In any event, the question is entirely factual. Petitioner alleges no conflict among the circuits, and there is no other consideration warranting this Court's review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1985

DOJ-1985-12

(3)

Supreme Court, U.S.
FILED
DEC 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-603

In the Supreme Court of the United States

OCTOBER TERM, 1985

ESTATE OF ALICE B. SMITH

Petitioner,

V.

UNITED STATES OF AMERICA

Respondent.

Reply Brief on behalf of the Estate of Alice B. Smith

JOHN McENERY ROBERTSON
636 First NBC Building
210 Baronne Street
New Orleans, LA 70112
Telephone: (504) 525-9823
Counsel for Petitioners

Counsel of Record

BEST AVAILABLE COPY

8 pp

TABLE OF AUTHORITIES

page

Cases Cited

U.S. v. Boyle, executor of the estate of Boyle, ____ U.S. ____, 105 S. Ct. 687-690, 83 L. Ed. 2d. 622 (1985). 4

REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

MAY IT PLEASE THE COURT:

The Memorandum for the United States in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed herein lays great stress upon the fact that the question is purely factual and that the Estate Tax Return was filed late and that factually the late filing could not be excused as being due to "reasonable cause". HOWEVER, The Memorandum for the United States in Opposition does not answer the factual position of this case that the estate was amply solvent and at any time a payment could have been made which would have obviated a penalty.

A payment was not made because on two occasions, May 2, 1975 and July 15,

1975 in Form 4768, Application for Extension of Time to File U.S. Estate Tax Return and/or Pay Estate Tax, the Executor advised that the appraisals of minerals rights had been completed and both Forms 4768 included the question "PLEASE ADVISE IF WE SHOULD MAIL A PAYMENT TO AVOID ANY PENALTY" (Capitals added). On both occasions the IRS gave the Executor erroneous advice by stating "Please attach a copy of this form to the return when filed" on the first occasion and on the second occasion, "You should attach a statement to the return when filed stating why the return could not be filed timely."

The record is complete and shows from the findings of both lower courts, the Executor had no experience in estate tax matters and did not know that a payment would have obviated a penalty.

He would have made such a payment if the IRS had responded correctly to his request.

It is respectfully submitted that the IRS had an obligation to answer the question fully or if it did not wish to answer the question fully, to state that the Executor should receive advice from another source, however, it is respectfully pointed out that the Executor, as any good lawyer, not knowing the state of the law, attempted to receive advice from the ultimate expert in all tax matters, the Internal Revenue Service, and received erroneous advice.

Having given the Executor erroneous advice, in that he was lulled into a sense of security by the statement "You should attach a statement to the return when filed stating why the return could not be filed timely", it is erroneous to

say the least for the Internal Revenue Service to now exact a penalty after the Executor had relied on its erroneous advice.

If the IRS had advised the Executor to file a return or make a payment on the basis of the mineral rights, which had been appraised, and make a partial payment, then of course there would be no penalty, not having done so, the IRS should not be allowed to exact a penalty when its own regulations, as quoted in this Honorable Court's opinion, in U.S. vs. Boyle, Executor of the Estate of Boyle, _____ U.S. _____, 105 S.Ct. 687, 690, 83 L.Ed.2d 622, in n. 8, which specifically holds that the reliance of the taxpayer on erroneous advice of the Internal Revenue Service is LEGAL reasonable cause.

The Supreme Court has clearly pointed out that there are two reasonable causes, one is factual and one is legal. The question before this court is that legally the taxpayer had reasonable cause to reply on the erroneous advice of the Internal Revenue Service.

The Memorandum for the United States in Opposition makes no argument about "Legal Reasonable Cause". Therefore, it is axiomatic that they have admitted that there is "Legal Reasonable Cause" and that the penalty should not be exacted in this case.

RESPECTFULLY SUBMITTED

JOHN McENERY ROBERTSON
COUNSEL FOR PETITIONER